Supreme Court, U.S.
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90-1263

In the Supreme Court of the United States

October Term 1990

ROBERT DONALD YASKO,

Petitioner,

vs.

STATE OF WASHINGTON,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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QUESTION PRESENTED

Whether the refusal by the trial court to allow the defendant counsel of his choice is an abuse of discretion when the trial court based its decision upon the erroneous belief that the defendant did not have the right to counsel of his choice but had only a right to competent counsel.

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IN THE SUPREME COURT OF THE UNITED STATES

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NO. _____

ROBERT DONALD YASKO
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vs.

STATE OF WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

To The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Robert Douglas Yasko, Petitioner, respectfully prays that a Writ of Certiorari issue to review **Part I** of the unpublished opinion of the Court of Appeals of the State of Washington (Division Two) No. 11609-0-II, **certiorari** denied by the Supreme Court of the State of Washington on February 6, 1990, (Order number 199/39; case number 56708-5).

QUESTION PRESENTED

Whether the refusal by the trial court to allow the defendant counsel of his choice is an abuse of discretion when the trial court based its decision upon the erroneous belief that the defendant did not have the right to counsel of his choice but had only a right to competent counsel.

OPINION BELOW

The unpublished opinion of the Court of Appeals of the State of Washington (Division Two) was filed October 19, 1989, and appears in the appendix.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT OF THE CASE

The material facts of this case are not in dispute, and they are set out in **Part I** of the appended opinion of the Washington State Court of Appeals. The defendant was charged with first degree murder and a jury convicted him.

With respect, Petitioner disagrees with the appellate court's statement of the facts surrounding his request for counsel. To the contrary, Petitioner did advise the trial court of new witnesses and further legal arguments.

Although discussed by the appellate court in **Part II** of its opinion, the petitioner did not raise the issue of the ineffective assistance of counsel, nor is it raised in this petition.

Voir dire examination of the jury had begun on May 6, 1987. That evening, the defendant learned that his parents had just acquired retirement funds with which to retain private counsel for his defense. On the morning of May 7, the court in chambers heard a motion for the granting of the withdrawal of appointed public counsel, and for the substitution of privately retained counsel, and for a continuance.

The court, upon hearing arguments in chambers, denied the motions. After further argument, the court also denied a motion for reconsideration. On May 7, the defendant proceeded to trial with state-appointed counsel.

REASONS FOR GRANTING THE WRIT

The issues in this case apply to a proper understanding and application of one's Sixth Amendment right to counsel.

There is no dispute that the defendant wanted to retain private counsel with private funds. There is no dispute that he made such intentions known to the court in a timely manner. There is no dispute that he acted with proper motives when seeking a continuance and private counsel, and was not intending to gain undue delay.

This case presents two issues. First, that 'the right to counsel' is an issue conceptually distinct from 'the ineffectiveness of counsel'. Secondly, that the exercise of judicial discretion should be accompanied by a statement of reasons for its exercise.

The Petitioner contends that his right to counsel of his choice was abridged because the trial court exercised its discretion improperly.

This Court has affirmed that a criminal defendant has the Sixth Amendment right to counsel to retain private counsel. **Wheat v. U.S., 486 U.S..153, 159; 108 S. Ct. 1692, 1697; 100 L. Ed. 2d 140 (1988); Caplin & Drysdale, Chartered v. U.S., ____ U.S. ____, 109 S. Ct. 2646, 2652, (1989).** The Court has held that the exercise of the right to one's own counsel may be rightly circumscribed by inherent elements of legal propriety and reasonable consideration of the facts surrounding the exercise of the right, **pari passu.** "Thus, while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." **Wheat.** at 108 S.Ct., at 1697.

In **Caplin,** this Court observed that "... the Sixth Amendment guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." 109 S.Ct., at 2652. However, a litigant may not retain counsel with illegal funds.

Certain valid constitutional rights may be wrongly exercised, as when one attempts through their exercise to thwart or undermine the judicial process. **U.S. v. Burton, 584 F.2d 485, at 489, and at 490-491, (1978); U.S. v. Sexton, 473 F.2d 512 (1973); U.S. ex rel. Carey v. Rundle, 400 F.2d 1210 (1969).**

Is the exercise of the Sixth Amendment right to counsel of one's choice a threshold right? Does an exercise of the right by the defendant right-holder obtain only after certain threshold conditions are met? For example, may a court require the defendant (as in this case) to prove to the satisfaciton of the court and the prosecutor that private counsel could present a better defense than would state-appointed counsel? (The parallel might be with the English system, in which some barristers become Queen's Counsel, which is an appointment granted to senior barristers by the Queen on the recommendation of the Lord Chancellor. Barristers who are not QC's are known as "juniors", whatever their age. A Queen's Counsel is instructed to conduct more important cases, and are assumed to have great experience in their specialty.) But would this be a proper test at American law? Would one, were he in the position of the Petitioner, first have to prove to the court that his counsel was like a Queen's Counsel, and that the state-appointed attorney was like a junior counsel, namely: one possessed of less experience and expertise? If, having passed the threshold of proving that one's private counsel were an abler advocate than appointed counsel, would the defendant then get to exercise his Sixth Amendment right to counsel of his choice?

Such a threshold test would require the defendant, before he could exercise his Sixth Amendment right, to dispose of certain **a priori** barriers to the exercise of a right. The threshold barriers could be looked at as if they were direment impediments which prohibited the free exercise of the right to counsel of one's choice. The question then may be, Is a defendant first required to exclude most **a priori** conditions which could impinge upon his free exercise of the right before he may assert and then exercise the right?

The argument of the Petitioner here is that he ought not to be required to prove whether his choice of private counsel is necessarily a wise and skilled choice (even though it may in fact be so), but that he ought to be permitted to exercise his choice of whom he wants to represent him (which may, or may not be, beneficial to his interests). It does not seem an inherent logical feature of the Sixth Amendment right to counsel that a defendant first must prove to the court that one's choice is a wise or salubrious choice **per se**, before one can exercise that choice under the Constitution.

In this case, the Petitioner did not seek to delay or thwart or undermine the trial process, a point in which the trial court concurred. Such the case, is there yet some direment impediment which would bar the exercise of his Sixth Amendment right to counsel of his choice?

The reasoning on cases in which Sixth Amendment rights to counsel are foreshortened reveals that some greater condition intercedes to suspend or deny or override the exercise of a constitutional right. If an accused is exercising a right to cause unreasonable delay or to thwart the ends of the court itself, the exercise of a right may be circumscribed because a defendant is being unreasonable and is, in some way, attempting to undermine the legal process. One then looks to the facts on a case to case basis. "The constitutional mandate is satisfied so long as the accused is afforded a fair or reasonable opportunity to obtain particular counsel, and so long as there is no arbitrary action prohibiting the effective use of such counsel." **Carey at 1215 (supra).**

When, if at all, do Sixth Amendment rights become 'inexorable'?

If 'inexorable' is taken at its roots, the term suggests that one is being rigidly severe, or incapable of being moved by reason or entreaty. The element of unreasonableness enters, suggesting that a party will not look at the circumstances as they are. An inexorable desire or request touches of the older moral notion recalled from Aristotle's **Nicomachean Ethics** that a proper moral choice does not seek after the morally impossible or unrealizable. It is herewith advanced that nothing in the Petitioner's case for seeking private counsel touched of the inexorable. The Petitioner only wished to exercise a constitutional right which he believed was permitted to him.

II

May the question revolve about a distinction: namely, that one may have a constitutional right, but its exercise is improper? At this point one could advert to the reasons on which the trial court founded its exercise of discretion. Discretion is but another way to state why one acted upon an intention. **Board of Pardons v. Allen, 107 S.Ct. 2415 (1987), at 2419.** "But the term discretion may instead signify that "an official must use judgment in applying the standards set him . . . by authority"; in other words, an official has discretion when the standards set by a statutory or regulatory scheme "cannot be applied mechanically." As long ago as **"Rooke's Case, Hill. 40 Eliz. in the Common Pleas, 345**, Coke, L.C.J., enunciated that discretion was not whimsey or randomness of mind," For discretion is a science or understanding to discern between falsity and truth, between right and wrong, between shadows and substance, between equity and colourable glosses and pretenses, and not to do according to their wills and private affections; for as one saith, **Talis discretio discretionem confundit."**

The Petitioner's case can be considered from an administrative mode. It may be stated that a trial court has the duty of managing the course of a trial. When determining if a (constitutional) right may be exercised by a litigant, one may have to ask if the managerial powers of the court of necessity have to take sway over private constitutional rights? In **Carey,** the Court of Appeals wrote: "This is not to say that there should not be an arbitrary and inelastic calendaring of cases without due regard, for example, to the existence of conflicting demands for the service of a particular counsel by different courts or by the schedules within a multi-judge court. In judicial administration, too, there should be no absolutes. It is the trial judge who must balance the conflicting demands of court administration with the rights of the accused, conscious, however, that when he considers the rights of those accused of crime, he must consider not only those involved in the case immediately before him but also those of other defendants awaiting trial whose rights may be affected by the consequences of trial delay." at 1215.

The administrative role of a trial judge in managing a trial may be much like the administrative role of the Secretary of Transportation in managing the road system. **Citizens To Preserve Overton Park, Inc., v. Volpe, 401 U.S. 402, 28 L.Ed. 2d 136, 91 S.Ct 814 (1971).** Just as the Secretary had the authority in **Overton Park** to determine where a highway may be constructed, subject to a determination by Congress that a highway, whenever feasible, should not go through parkland, so too it may be argued that a judge has a right to determine the procedure(s) and timing in his court, subject to the constitutional rights of a defendant to have counsel of one's choice, subject to the feasibility of the court dockets. It is the right of the court, as a manager of its own operations, to control its docket.

Thus, the Secretary was told that in the exercise of his discretion to determine where a particular highway would be built he had to consider the feasibility of avoiding parklands.

When he exercised his discretion without reference to that caution, he was overturned, and was then required to determine that same issue in good faith again. This Court said, "Thus it is necessary to remand this case to the District Court for plenary review of the Secretary's decision. That review is to be based on the full administrative record that was before the Secretary at the time he made his decision." **Overton Park,** at 420.

In the Petitioner's case, the same issue arises. The trial judge had to determine in his discretion whether to allow representation to the defendant by private counsel. In making that determination he had to consider whether the defendant's constitutional right to private counsel did interfere with the court's docket. It is clear from the record, however, that he did not understand that as the issue to be determined by him when denying the defendant's right to retain private counsel.

To the contrary, the trial judge believed the only issue for him to determine was whether appointed counsel from the Department of Assigned Counsel was competent. Viewing such to be the sole issue of law in front of the court, he refused the request for private counsel.

Under the law, the actual duty of the court should have been to weight the constitutional rights of the defendant for the retention of private counsel against the trial docket, considering the circumstances. The court did not. There is no record that the trial court ever assayed any conflicting demands of judicial administration to determine if a delay were feasible, and if a continuance could be permitted. In footnote '8' of **Carey (supra), at 1215,** drawing upon **Unger v. Sarafite, 376 U.S. 575 (1963),** that court said, "The Supreme Court has stated that in deciding whether the refusal to grant a continuance is a denial of due process particular emphasis should be placed on the reasons presented to the trial judge at the time the request was denied."

This Court should return the question to the trial judge, in the same way that it had previously returned the decision of the Secretary of Transportation, for a plenary review as to a determination of the proper standard of law.

The trial court made two fundamental errors. First, it decided the wrong question because it was wrongly informed in the premises. The question should have been: Does the defendant have the right to retain private counsel of his choice, especially when that counsel is present and was willing to be retained by the defendant? But the court decided this question: that a defendant only has the right to competent counsel, and not to counsel of his choice under the Sixth Amendment.

The second incorrect question the court entertained was that if a defendant were to have the right to elect private counsel of his choice, then the court and the prosecutor, in some fashion, will have to be convinced that such proposed counsel will be better than presently appointed state counsel. The court devised a means test or threshold test which a defendant first had to overcome before a defendant could choose private counsel under his Sixth Amendment right to counsel of his choice. This was to impose an improper restriction upon the Petitioner's exercise of his fundamental constitutional right to counsel of his choice. Cf., **Anaya v. People, 764 P.2d 770 (Colo. 1988)** at 782-3, "In . . . **Morris v. Slappy, 461 U.S. at 27,** . . Justice Brennan contrasted a claim of ineffective assistance of counsel with a claim of deprivation of one's counsel of choice. He observed that in an ineffective assistance of counsel claim, it may be appropriate to require a show of prejudice "because courts are able to assess an attorney's performance and the effect of that performance on a defendant's rights based on the records before them." **Id.** When a defendant has been denied his counsel of choice, the same judgment cannot be made by the reviewing courts . . . Accordingly, "there is no way to know whether the character

of the proceedings would have changed, whether counsel would have made different decisions, or whether the defense strategy would have been different [if counsel of choice] had represented [the defendant]." **Id.** at 28, 103 S.Ct. at 1624. Under these circumstances, prejudice to the defendant is assumed without the necessity of showing specific prejudice." Further on, one reads. "Second, to adopt the court of appeals' suggestion that a defendant be required to show that his substitute counsel rendered ineffective assistance would be to make the defendant's right to counsel of choice meaningless."

Lastly, the court made no finding that judicial administration would have been unduly stalled if a continuance had been granted to the Petitioner to accommodate a substitution of counsel. The test which **Wheat, (supra)**, at 1700, envisaged, " . a trial court may in certain situations reject a defendant's choice of counsel on the ground of a potential conflict of interest, because a serious conflict may indeed destroy the integrity of the trial process," does not arise nor present itself in the Petitioner's case. In **Unger (supra),** cited in **Carey (supra)** at 1215, footnote '8', one reads: "In **Unger v. Sarafite,** . . . the period of five days in which to obtain counsel and prepare a defense was held not to be constitutionally inadequate, in view of the facts of that case."

CONCLUSION

It has been the argument advanced by the Petitioner that the Sixth Amendment permits one to have counsel of one's choice. To require a defendant to pass some kind of means test or threshold test before one can exercise this constitutional right is, in effect, to deprive one of that right and the protection it affords. This case is **not** about the ineffective assistance of counsel and any consequences flowing from that proposition. This case is about the guaranteed constitutional right which a defendant has in a criminal case to retain counsel of one's choice without impediment. When a manage-

rial right, such as the right of the court to manage its calendar, conflicts with a constitutional right, such as the Sixth Amendment right to counsel, then it is an obligation of the court to assess such a conflict, make public findings, and to determine whether or not some higher legal principle must control should Sixth Amendment rights of necessity need to be abridged. In this case no such findings were made, and no such higher principle was invoked in order to justify the trial court's denial of the Sixth Amendment right to counsel of the defendant's choice. The trial court wrongly construed the implications of the Sixth Amendment right to counsel, and did so through an abuse of the exercise of its discretion, having been wrongly informed in its premises as to the nature of the legal proposition it was called upon to understand and decide.

The judgment should be reversed, and the case remanded.

***

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THE SUPREME COURT

C.J. MERRITT
CLERK

STATE OF WASHINGTON

TEMPLE OF JUSTICE
MAIL STOP AV-11
OLYMPIA, WA 98504-0511
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February 6, 1990

Dr. J.M.B. Crawford
Attorney at Law
The Town House
117 Tacoma Avenue North
Tacoma, Washington 98403

Honorable John Ladenburg
Pierce County Prosecutor
Ms. Chris Quinn-Brintnall, Deputy
946 County-City Bldg.
Tacoma, Washington 98402

Re: Supreme Court No. 56708-5 - State v. Robert D. Yasko
Court of Appeals No. 11609-0-II

Counsel:

The above entitled petition for review was considered by its February 6, 1990, petition for review calendar.

The petition was denied by order number 199/39 filed on February 6, 1990.

Sincerely,

SS

C. J. MERRITT
Supreme Court Clerk

AJE: mja

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	11609-0-II
	)	
ROBERT D. YASKO,	)	DIVISION TWO
	)	
Appellant.	) Filed	October 19, 1989

DOLLIVER, J. — — In late 1986, the defendant, Robert Yasko, and his wife Maria separated. Maria moved in with another man. Yasko's relationship with Maria fluctuated capriciously. They had agreed, however, to file a joint tax return.

On February 12, 1987, Yasko went drinking after work, came home, and called Maria to arrange for her to sign the tax forms. Maria refused. Yasko went out and bought a rifle. He testified that the rifle was only to coerce Maria into signing the tax forms. Maria was a black belt in karate and would not take demands for her signature seriously without a way to enforce them. Yasko also purchased ammunition and loaded the gun.

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*This appeal was heard by two Supreme Court Justices and a retired Superior Court Judge sitting as Judges Pro Tempore of the Court of Appeals in Division Two, pursuant to CAR 26.

Yasko drove to Maria's workplace and used a ruse to get Maria out to the car. Then Yasko took out the rifle. Maria grabbed for the gun. Yasko shot four times. Maria fell to the ground. Yasko got in the car and drove off. Police soon apprehended Yasko. The rifle was found in the car. The tax forms were not.

Yasko was charged with first degree murder. He had no money so counsel was appointed. Yasko's parents later acquired and put up money for Yasko to retain counsel. The second day of trial Yasko requested change of counsel, arguing that appointed counsel had limited funds. Yasko did not propose new arguments, did not show investigations were negligently limited, and did not name other witnesses. The voir dire process was under way and witnesses were already subpoenaed.

The trial judge denied the request. Yasko appeals, claiming denial of both choice of counsel and effective counsel, and also challenging RCW 9A.32.030 on vagueness grounds. We affirm.

I

Yasko argues that denial of his request for change of counsel unconstitutionally denied his right to choice of counsel. While choice of counsel is an "essential component" to the right of counsel, it is not absolute. **Linton v. Perini,** 656 F.2d 207, 209 (1981). It consists of a "fair and reasonable initial opportunity to retain counsel", **United States v. Burton,** 584 F.2d 485, 490 (1978), "carefully balanced against the public's interest in the orderly administration of justice." **Burton,** at 489.

Fair opportunity generally means the "accused who is financially able to retain counsel must not be deprived of the opportunity to do so." **Burton**, at 489. However, a defendant is not denied choice of counsel if he must settle for a court-appointed attorney. **United States v. Friedman**, 849 F.2d 1488 (1988). Moreover, financial ability alone is not determinative.

> Every person has a constitutional right to retain at his own expense his own counsel **so long as** that right does not unreasonably interfere with the normal progress of a criminal case.

(Italics ours.) **Linton,** at 211. Because the court must weigh other factors, choice of counsel may not be violated when the court only maintains the initial choice of counsel, e.g., **United States v. Burton,** supra; **McGill v. United States**, 348 F.2d 791 (1965), as opposed to when it intrusively replaces it. **Linton v. Perini, supra; United States v. Rankin**, 779 F.2d 956 (3d Cir. 1986).

Here, Yasko looked at his financial situation and chose to have appointed counsel. We cannot say fair opportunity was denied because the choice was based on earlier circumstances. Neither was it denied because Yasko had to settle for appointed counsel or because the trial court maintained the first choice. In fact, the court offered to add the new choice as co-counsel.

Yasko argues that circumstances altered his choice. The dissent in **United States v. Burton, supra,** supports this idea. "[I]f circumstances have arisen that vitiate the original choice . . ., a request for leave to choose new counsel must be carefully and seriously considered." **Burton,** at 505 (Robinson, J., dissenting).

However, the majority in **Burton** determined that despite "circumstances beyond the accused's control", it does not "[follow] automatically that the defendant did not receive a fair and reasonable opportunity to select his own counsel." **Burton,** at 499. And even the dissent noted that requests be treated cautiously "when new counsel is being sought late in the pretrial period". **Burton**, at 506 (Robinson, J., dissenting).

Choice of counsel must be balanced against the public's interest in "prompt, effective, and efficient administration of justice.", **Burton,** at 489, and the "inconvenience to the ligitants, witnesses, counsel, and the court". **Burton,** at 490. Thus, courts may be less tolerant of a change requested on the eve of trial or after the trial has begun. For example, in **McGill v. United States, supra,** the court stated that normally a defendant may replace appointed counsel with retained counsel when he finds funds. **McGill,** at 795. However, as noted by the dissent in **Burton,**

> [s]ince . . . the request was made just **four days before trial** was to begin — we held that the substitution could be refused because the accused did not bother to explain either the basis of his dissatisfaction or why he had not utilized his ample prior time to secure retained counsel.

(Italics ours.) **See Burton,** 584 F.2d at 507 (Robinson, J., dissenting) (citing **McGill,** at 795).

Other cases have also looked at the time of the request. **United States v. Paone,** 782 F.2d 386, 392 (2d Cir.), **cert. denied sub nom.,** 479 U.S. 882 (1986) (no unfettered right to retain new counsel particularly after trial commenced); **United States v. Lowe,** 569 F.2d 1113, 1116-17 (10th Cir. 1978); and **United States v. Calabro,** 467 F.2d 973, 986 (2d Cir. 1972) (no unbridled right to reject assigned

counsel and demand another once trial has begun). Courts are also less tolerant of a change in counsel if the defendant has competent counsel prepared for trial. **See Burton,** at 499.

Here, it was the second day of trial, witnesses were already subpoenaed, the voir dire process had begun, the defense had been granted a continuance already, appointed counsel was prepared, and the reasons for the change were not adequately substantiated. The request could rightfully be denied.

II

Yasko next claims he was denied the right to effective counsel. Denial of effective counsel means counsel's performance was deficient and the deficient performance prejudiced the defense. **Strickland v. Washington,** 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). The defendant must show the representation fell below reasonably effective assistance. **Strickland,** at 688, overcoming the presumption that counsel's conduct is reasonable. **Strickland,** at 689. The defendant must then show a reasonable probability that "but for counsel's unprofessional errors, the result of the proceeding would have been different." **Strickland,** at 694.

We find neither deficient performance nor prejudice. The decisions not to pursue certain defenses, not to seek further psychological analysis, and not to call further witnesses are trial tactics "well within the range of professionally reasonable judgments", **Strickland,** at 699 (decision not to seek more character or psychological evidence reasonable); **State v. Hess,** 86 Wn. 2d 51, 52, 541 P.2d 1222 (1975) (failure of court-appointed

counsel to subpoena witness shown to be legitimate trial tactics), and nothing indicates that other tactics had more basis, were more convincing, or could have altered the outcome.

Yasko attacks counsel's delayed search for the tax forms in the car taken into police custody; however, the prosecution had conceded the presence of tax forms.

Yasko argues that discussion of trial tactics between appointed counsel and the judge when considering the motion for change in counsel exposed to the prosecution the weaknesses of Yasko's defenses. The rules of criminal procedure, however, allow the court to probe into the defenses. **See** CrR 4.7(b)(2)(xiv); CrR 4.7(b)(2)(xiii); CrR 3.1(e). Furthermore, appointed counsel did not point out the weaknesses of the defense he would use or by which the defendant was tried, only those defenses which had been rejected.

Without deficiency or prejudice, differences of opinion over trial tactics are not enough to require substitution of new counsel for appointed counsel where the trial court had probed sufficiently and concluded the change would not solve anything. **State v. Cameron,** 47 Wn. App. 878, 737 P.2d 688 (1987).

III

Finally Yasko argues RCW 9A.32.030 is unconstitutionally vague because there is no difference between second degree murder "intent" and first degree murder "premeditated intent". To bolster this claim, Yasko asserted that "I intend to do "x" does not differ from I intend to do x "with premeditation".

The defendant makes too much of semantics. Jurors do not need linguistical perfection. A law gives adequate notice if a

person of ordinary intelligence can reasonably tell what is prohibited. **Seattle v. Huff,** 111 Wn. 2d 923, 929, 767 P.2d 572 (1989). RCW 9A.32.050 (1)(a) prohibits causing a death with "intent to cause the death of another person, but without premeditation", while RCW 9A.32,030(1)(a) prohibits causing death with "premeditated intent". Premeditation has been defined as involving "more than a moment in time", RCW 9A.32.020(1), and "involves the mental process of thinking [and] weighing or reasoning for a period of time, however short." **State v. Neslund,** 50 Wn. App. 531, 558, 749 P. 2d. 725 (1988) quoting **State v. Ollens,** 107 Wn.2d 848, 850, 733 P.2d 984 (1987)). Traditionally, jurors have made these kinds of distinctions. We find no reason why they could not make them now.

We hold the trial court's denial of substitution of counsel violated neither choice of counsel nor effective counsel rights and that RCW 9A.32.030 is not unconstitutionally vague.

SS

DOLLIVER, J.

WE CONCUR:

SS

PEARSON, J.

SS

SCHUMACHER, J. D/B

Pursuant to the ABLE procedural rules, it is ordered that the foregoing opinion shall/shall not be published.

_____ shall

_____ shall not

SS

GERRY L. ALEXANDER
CHIEF JUDGE, DIVISION II

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,	)	
Plaintiff,	)	No. 87-1-00334-7
v.	)	ORAL RULINGS OF THE
ROBERT YASKO,	)	COURT ON MOTIONS:
Defendant	)	11-16-87
	)	

BE IT REMEMBERED that on the 16th day of November, 1987, the foregoing matter was heard before the Honorable DONALD H. THOMPSON at the County-City Building, Tacoma, Washington;

The plaintiff was represented by TOM FELNAGLE, Deputy Prosecuting Attorney for Pierce County;

The defendant was represented by J.M.B. CRAWFORD, Attorney at Law.

WHEREUPON, the following proceedings were heard;

* * * * * *

COPY

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THE COURT: I could probably go into a long dissertation, but I'm not going to. I am concerned at this juncture with only one of several motions and that is the motion concerning the defendant's Sixth Amendment right to assistance of counsel. I am convinced that that right affords the defendant a right to counsel. The defendant did have counsel appointed for him. The right does not afford the defendant the right to counsel of his choice.

When, during what I believe was the second day of trial --

MR. CRAWFORD: Yes, Your Honor.

THE COURT: -- the second day of trial, the defendant announced that he had funds available through his parents and wished to retain his own private counsel, because this would involve a continuance if the defendant's requests were granted, the court in chambers outside the presence of the jury did inquire into the good faith of the defendant's request. And that was done, of course, in inquiring about for what reason the defendant wished to have a new counsel, and in matters of self defense, out-of-state witnesses, investigation of the defendant's tax return, the defendant's wife, who was the victim, as to her prowess at -- I forget the particular science of martial arts, whether it was -- well, anyhow, her physical abilities -- those were all looked into by the appointed counsel. They have

previously been considered. And what it came down to was the defendant could not give any specific reason as to what he was going to do with new counsel.

The case that I find, and they are hard to find, the case that comes closest is **Morris v Slappy**, United States Supreme Court found at 461 U.S. 1. In that case, the Court of Appeals had recited what the Supreme Court denominated "a novel Sixth Amendment right to counsel with whom the accused has a 'meaningful relationship'." And the Supreme Court rejected that, saying there was no such right. It was the second day of trial. The witnesses had been subpoenaed, it was well into the voir dire process; a previous motion for continuance had been made by the defendant, objected to by the state, and after inquiring as to the defendant's reasons for wanting to retain new counsel and not being given any specifics, the court denied the request.

The motion will be denied.

(Discussion held off record; noon recess held.)

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THE COURT: This argument I think points out, as I recall, the strategy of the defense and the final argument at the time of trial. As I understand Dr. Crawford's argument, it would be that the premeditation to kill must